No. 83-789

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In The

Supreme Court of the United States

October Term, 1983

GENEVIEVE S. ADAMS, *et al.*,

Petitioners,

vs.

THE PROCTER & GAMBLE MANUFACTURING COMPANY,

Respondent.

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FOURTH CIRCUIT

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QUESTION PRESENTED

The United States Court of Appeals for the Fourth Circuit is composed of ten judges in regular active service. 28 U.S.C. §46(c), set forth below, provides power to order a rehearing en banc by order of a majority of the circuit judges who are in regular active service.

After decision in this case by a three judge panel, the respondent filed a motion for rehearing and suggestion for rehearing en banc. The Circuit Court granted the rehearing en banc with five judges voting to grant the same, four voting to deny and with one judge being disqualified.

The question that is presented is this: Under those circumstances, do five judges constitute a majority of a court which has ten judges in active service?

LIST OF PARTIES

The list of all parties in the court below is as follows:

Appellants (Petitioners Herein)

Genevieve S. Adams, Louise Bertha, Algerie R. (Kelley) Brigerman, Ann Brown, Carrie B. Chaffin, Lelia B. Harthanson, Loretta M. Hinkle, Nellie Kern, Martha McGinn, Anna M. Miller, Dorothy Shawker, Claretha Smith, Lorrayne M. Soethe, Margie Stover, Shirley S. Sunderland and Ethel Wimpling.

Appellee (Respondent Herein)

The Proctor & Gamble Manufacturing Company.

Amicus Curiae

Equal Employment Opportunity Commission.

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THE PROCTOR & GAMBLE MANUFACTURING COMPANY,

Respondent.

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FOURTH CIRCUIT

To the Honorable, the Chief Justice and Associate Justices of the Supreme Court of the United States:

Genevieve S. Adams, Louise Bertha, Algerie R. (Kelley) Brigerman, Ann Brown, Carrie B. Chaffin, Lelia B. Harthanson, Loretta M. Hinkle, Nellie Kern, Martha McGinn, Anna M. Miller, Dorothy N. Shawker, Claretha Smith, Lorrayne M. Soethe, Margie Stover, Shirley S. Sunderland and Ethel Wimpling, the petitioners herein, pray that a writ of certiorari issue to review the judgment of the United States Court of Appeals for the Fourth Circuit entered in the above entitled case on May 18, 1982 (the same having been the subject of timely motions for rehearing).

OPINIONS BELOW

The January 17, 1983 opinion of the United States Court of Appeals for the Fourth Circuit, sitting en banc, whose judgment is hereby sought to be reviewed, is reported at 697 F. 2d 572 and is printed in the Appendix hereto at pp. 1a-21a. Petitioners filed a timely motion for rehearing under FRAP 40 which was denied on August 12, 1983 and as appears at Appendix pp. 76a-77a.

The panel decision of the Circuit Court is reported at 678 F. 2d 1190 and is reproduced in the Appendix at pp. 22a-55a.

The opinion of the United States District Court for the District of Maryland is unreported and appears at Appendix pp. 56a-72a.

JURISDICTION

In accordance with the panel decision herein, judgment was entered on May 18, 1982 (Appendix, pp. 78a-81a). Respondent's timely petition for rehearing and suggestion for rehearing en banc was granted on August 30, 1982 (Appendix,pp. 74a-75a). The opinion of the court en banc was entered on January 17, 1983. Petitioners then filed a timely motion for rehearing which was denied by order of August 12, 1983 (Appendix, pp. 76a-77a).

The jurisdiction of the Supreme Court is invoked under 28 U.S.C. §1254(1).

STATUTORY PROVISIONS AND RULES INVOLVED

This petition involves 28 U.S.C. §46(c) which reads:

> Cases and controversies shall be heard and determined by a court or panel of not more than three judges (except that the United States Court

> of Appeals for the Federal Circuit may sit in panels of more than three judges if its rules so provide), unless a hearing or rehearing before the court in banc is ordered by a majority of the circuit judges of the circuit who are in regular active service, or such number of judges as may be prescribed in accordance with section 6 of Public Law 95-486 (92 Stat. 1633), except that any senior circuit judge of the circuit shall be eligible to participate, at his election and upon designation and assignment pursuant to section 294(c) of this title and the rules of the circuit, as a member of an in banc court reviewing a decision of a panel of which such judge was a member. A court in banc shall consist of all circuit judges in regular active service.

Also involved is Rule 35(a) of the Federal Rules of Appellate Procedure, which reads:

> A majority of the circuit judges who are in regular active service may order that an appeal or other proceeding be heard or reheard by the court of appeals in banc. Such a hearing or rehearing is not favored and ordinarily will not be ordered except (1) when consideration by the full court is necessary to secure or maintain uniformity of its decisions, or (2) when the proceeding involves a question of exceptional importance.

STATEMENT OF THE CASE

Petitioners instituted this proceeding in the United States District Court for the District of Maryland seeking injunctive and other relief against alleged racial discrimination in employment. Jurisdiction in the District Court was based on §706(f)(1) of the

Civil Rights Act of 1964, 42 U.S.C. §2000-e5(f)(1) and on §§1331, 1343(4), 2201 and 2202 of 28 U.S.C.

The respondent moved to dismiss on the basis that right-to-sue letters had been improperly issued by the Equal Employment Opportunity Commission (the EEOC). That contention was grounded on the fact that the EEOC had previously filed suit against the respondent, that the petitioners had not intervened in that case and that the EEOC litigation had been terminated by a consent decree.

Respondent argued, and the District Court agreed, that a consent decree in the EEOC litigation cut off the petitioners' right to initiate their own action under Title VII of the Civil Rights Act.

Upon petitioners' appeal, a majority of the three judge panel found the District Court to be in error, vacated the judgment of that Court and remanded the case for further proceedings.

Respondent then filed a petition for rehearing and suggestion for rehearing en banc, which was granted on August 30, 1982. On January 17, 1983 the opinion of the Circuit Court en banc was filed with a majority affirming the judgment of the District Court. Judge Phillips dissented in an opinion joined by Chief Judge Winter and Judge Sprouse. Judge Widener concurred in the opinion of the majority but went on to note

> . . . a possible procedural difficulty not yet fully resolved by this court which might change the result of this case. In the case of *Arnold v. Eastern Airlines,* No. 80-1245, et al., on December 23, 1982 the en banc court entered an order which, temporarily at least, granted rehearing in that case. The vote of the en banc court of course is binding upon us. The vote in that case was 5 for rehearing

> en banc and 4 against, with one disqualification. After the vote taken in that case, one of the judges who had voted against rehearing took senior status, further complicating the matter.
>
> In the case before us, 5 judges voted for rehearing en banc and 4 voted against, with one disqualification.
>
> It is arguable, of course, that rehearing in this case was not properly authorized under 28 U.S.C. §46(c) as the authorities cited in the *Arnold* order I have above referred to discuss. (Appendix, pp. 11a-12a).

Having learned for the first time of the votes taken on granting the rehearing en banc in this case, counsel for the petitioners then filed a petition for rehearing on the issue of whether the en banc hearing had been improvidently granted.

By order of August 12, 1983 the Circuit Court denied petitioners a rehearing on the basis that the court had "definitively decided" the issue in the case of *Arnold v. Eastern Airlines, Inc.*, 712 F. 2d 899 (filed July 8, 1983) — the case called to counsel's attention by the concurring opinion of Judge Widener herein (the opinion in *Arnold v. Eastern Airlines, Inc.* is reproduced at Appendix pp. 82a-206a and is cited hereafter as *Arnold*).

REASONS FOR GRANTING THE WRIT

I.

Certiorari should be granted to resolve conflicts between the Circuit Courts on the issue presented.

There is no question but that a conflict exists between the Circuits as to the proper interpretation of 28 U.S.C. §46(c), which,

for purposes of this case, reads in pertinent part:

> Cases and controversies shall be heard and determined by a court or panel of not more than three judges . . . unless a hearing or rehearing before the court in banc is ordered by *a majority of the circuit judges who are in regular active service* . . . . [Emphasis supplied.]

In this case the Circuit Court relied upon its just filed decision in *Arnold v. Eastern Airlines, Inc.*, 712 F. 2d 899 (1983). In that case a majority ruled that a judge who recuses or disqualifies himself is *out of service* insofar as the particular case is concerned. *Arnold, supra,* at 904. Applying that rationale to the present case resulted in a rehearing by order of five judges which in turn was found to be a majority of an otherwise ten-member court. Judges Widener and Phillips dissented from the holding "Because five votes does not constitute a majority of ten, the number of circuit judges in regular active service at the time of the poll. . . ." 712 F. 2d 908.

The majority recognized that its holding conflicted with that of the Second Circuit in *Zahn v. International Paper Co.*, 469 F. 2d 1033, 1041 (2d Cir. 1972), *affirmed on other grounds,* 414 U.S. 291 (1973). The Second Circuit had consisted of nine judges, one seat was vacant and one judge did not vote due to disqualification. Of the remaining seven judges, four voted to rehear and three not to rehear. The petition for rehearing was denied "for want of an affirmative vote 'by a majority of the circuit judges who are in regular active service.'" *Zahn, supra,* at 1040. The Second Circuit adhered to its understanding of §46(c) in *Boyd v. Lefrak Organization,* 517 F. 2d 918 (2d Cir. 1975). The dissenting opinion in that case observed:

> This is another case, like *Zahn* . . . where a majority of the active judges qualified to vote favor

> a rehearing en banc, but because a majority of the active judges authorized by law to sit on the court cannot be mustered the petition for rehearing fails. 517 F. 2d at 919.

The decision in the present case is also in direct conflict with *Clark v. American Broadcasting Companies, Inc.*, 684 F. 2d 1208 (6th Cir. 1982). In that case a motion for rehearing had been ordered only to be followed by a subsequently published order that reads:

> . . . The Chief Judge has now directed me to advise that his ruling was made in error and that in fact the 5-4 vote (*one active judge being disqualified*) failed to attain the 6 affirmative votes *required* to constitute "a majority of the [10] circuit judges who [were] in regular active service" within the meaning of Rule 35(a) of the Federal Rules of Appellate Procedure . . . . [684 F. 2d at 1226; emphasis supplied.]

Other Circuits have reached similar results. Thus, in *Curtis-Wright Corp. v. General Elec. Co.*, 599 F. 2d 1259 (3d Cir. 1979) rehearing was denied where four judges voted to rehear, three voted not to rehear and two judges did not participate (the dissenting opinion of Judge Gibbons indicates that this was the result of recusals). *See also, Copper & Brass Fabricators Council, Inc. v. Department of the Treasury, et al.*, 679 F. 2d 951 (D.C. Cir. 1982), *reh'g denied*, unpublished orders in Civil Action No. 81-00126 (reproduced in Appendix, pp. 207a-210a) where there were five votes to rehear, three not to rehear and two judges not participating; *Porter County Chapter of Isaac Walton League v. Atomic Energy Comm'n*, 515 F. 2d 513, 533-34 (7th Cir. 1978) (*rehearing denied*, four votes being to rehear, three against and one judge taking no part), *rev'd on other grounds, sub nom.*

Northern Indiana Public Service Co. v. Porter County Chapter of Isaac Walton League, 423 U.S. 123 (1975).

Thus, the Second, Third, Sixth, Seventh and District of Columbia Circuits follow a literal reading of §46(c) and require an absolute majority of the total number of circuit judges to vote in favor of rehearing before such a motion is granted.

A minority of Circuits have ruled otherwise. The Eighth Circuit by its Rule 16(a) applies a rule of a majority of judges who are in regular active service and "who are not disqualified in the particular case." Rule 16(a) of the United States Court of Appeals for the Eighth Circuit. The Ninth Circuit follows a similar policy. *See Ford Motor Co. v. Federal Trade Comm'n,* 673 F. 2d 1008, 1012, n. 1 (9th Cir. 1982) (Reinhardt, J., dissenting). *See also, United States v. Martorano,* 620 F. 2d 912 (1st Cir. 1980), where the court dealt with the issue in the context of a vacancy on the court.

Petitioners in this case were asserting important federal rights, the policy against discrimination being considered to be one of highest priority. *E.E.O.C. v. General Electric Co.,* 532 F. 2d 359, 372-73 (4th Cir. 1976). Their case presents a clear-cut opportunity to resolve the conflict between the Circuits on an important issue affecting judicial administration. Unlike *Arnold,* there is no complicating factor of a judge having taken senior status between the time of the poll and the entry of the order. And unlike *United States v. Martorano, supra,* there is no complicating factor of a vacancy on the court. The issue of including or excluding disqualified judges for purposes of determining a majority of the judges in active service is squarely presented.

Also of note is the fact that the EEOC, as amicus in this case, not only supported the petitioners as to the underlying merits but on the issue here presented as well. Moreover, in *Arnold,*

the United States as an appellee opposed the grant of rehearing under the similar, if not identical, circumstances there present.

With ever-increasing litigation and the frequency of recusals, the problem is a recurring one. As noted by Judge Widener in this case, "Disqualification of more than one judge is not uncommon in this circuit." *Arnold, supra,* n. 3, 712 F. 2d at 912.

II.

Certiorari is appropriate because the decision below is in conflict with an applicable decision of the Supreme Court or, alternatively, it decided an important question of federal law which has not been but should be settled by the Supreme Court.

This Honorable Court has had occasion to consider the subject of en banc courts in several cases. In *Textile Mills Corp. v. Commissioner,* 314 U.S. 326 (1941), it was held that the pertinent statutes did not prohibit a Court of Appeals with more than three judges from hearing a case en banc. There followed *Western Pac. R. Corp. v. Western Pac. R. Co.,* 345 U.S. 247 (1953), which construed the predecessor to §46(c) as a grant of power to order hearings and rehearings en banc and which held it to be error for a court to strike out the application of a party for en banc consideration.

More recently, *Shenker v. Baltimore & Ohio RR Co.,* 374 U.S. 1, 4-5, dealt with a decision of the Third Circuit when it was composed of eight judges in active service. Four had voted to rehear, two voted not to rehear and two judges abstained. The denial of the rehearing by the Third Circuit was affirmed. Judge Widener in the present case presented the following analysis of *Shenker:*

> . . . Both the holding of the Third Circuit and the Supreme Court are entirely consistent with the

> wording of the statute . . . even discounting the two *Shenker* abstentions, the vote at the very best for the petitioner was four for and two against if we count the abstentions as votes against granting the petition. It is at once apparent that four to two is a majority of those judges not disqualified, and so the fact situation presented to the Supreme Court in *Shenker* is the same as presented to us here. Since the *Shenker* case offered a perfect opportunity for the Supreme Court to adopt the view the majority now does, and it did not do so, I suggest that, because the adoption of the majority view here would have changed the result of the *Shenker* case, the Supreme Court has rejected the position the majority now embraces. . . . [712 F. 2d at 909-910.]

If Judge Widener's analysis is incorrect, then the Supreme Court has *not* in fact decided the issue. Since, for reasons argued in section I., the matter is one of importance in federal jurisprudence, it should be authoritatively resolved.

CONCLUSION

Wherefore, petitioners respectfully pray that a writ of certiorari be granted.

Respectfully submitted,

SIDNEY BLUM
Attorney for Petitioners